

1 WADE WARNER,

2 Plaintiff,

3 v.

4 DENNIS JAY DELANO,

5 Defendant.

6 Case No. 21-cv-05666-HSG7 **ORDER TO SHOW CAUSE**

8 Plaintiff Wade Warner filed this action against Defendant Dennis Delano on July 23, 2021.
9 *See* Dkt. No. 1. The Court previously granted Defendant's motion to dismiss, Dkt. No. 22, and
10 Plaintiff filed an amended complaint, Dkt. No. 23 ("FAC"). Plaintiff alleges that Defendant
11 violated the Americans with Disabilities Act ("ADA") and the California Unruh Civil Rights Act
12 by denying him the ability to shop at the Fairfax Market without a mask in April 2021 based on
13 concerns about COVID-19. *See* FAC at ¶¶ 2–3, 10–11, 14–27. Defendant has moved to dismiss
14 the FAC in its entirety. *See* Dkt. No. 46.

15 In the process of reviewing Defendant's motion to dismiss, a more fundamental issue has
16 come to the Court's attention regarding its subject matter jurisdiction.¹ Article III of the U.S.
17 Constitution limits the jurisdiction of federal courts to live "cases" or "controversies." U.S. Const.
18 art. III, § 2. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for
19 purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally
20 cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quotation
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¹ "Subject matter jurisdiction can never be forfeited or waived and federal courts have a continuing independent obligation to determine whether subject-matter jurisdiction exists" *See Leeson v. Transam. Disability Income Plan*, 671 F.3d 969, 975, n.12 (9th Cir. 2012) (quotation omitted).

1 omitted). “Because a private plaintiff can sue only for injunctive relief (*i.e.*, for removal of the
2 barrier) under the ADA, a defendant’s voluntary removal of alleged barriers prior to trial can have
3 the effect of mooting a plaintiff’s ADA claim.” *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 905
4 (9th Cir. 2011). As relevant here, several cases have concluded that claims based on COVID-19
5 safety policies are moot and federal courts lack subject matter jurisdiction following the lifting of
6 such restrictions. *See, e.g., Pletcher v. Giant Eagle Inc.*, No. CV 2:20-754, 2022 WL 17488019, at
7 *4–8 (W.D. Pa. Dec. 7, 2022) (collecting cases); *cf. Brach v. Newsom*, 38 F.4th 6, 11–15 (9th Cir.
8 2022) (finding moot plaintiff’s request for injunction and declaratory judgment regarding
9 California school reopening plan during COVID-19 pandemic because state had lifted all
10 restrictions on school reopening). Since this case was filed, California has ended its mask
11 mandate and the COVID-19 state of emergency that Defendant relied on when enforcing a mask
12 mandate in his store. *See* Dkt. No. 46 at 3.

13 The Court accordingly **DIRECTS** Plaintiff **TO SHOW CAUSE** why (1) the Court retains
14 subject matter jurisdiction over the ADA claim; and (2) if it does not, why the Court should
15 nevertheless exercise supplemental jurisdiction over the remaining Unruh Act claim. Plaintiff is
16 directed to file his response to this order to show cause by June 20, 2023. Defendant shall file a
17 response by June 27, 2023, and should indicate whether the Fairfax Market still requires patrons to
18 wear a mask or when it lifted such protocols if they are no longer in place. The matter will be
19 deemed submitted once the briefing is complete unless the Court determines that a hearing is
20 necessary. The Court further **VACATES** the June 15, 2023 hearing on the motion to dismiss and
21 the initial case management conference. The Court will reset the hearing if necessary once this
22 jurisdictional question has been resolved.

23 **IT IS SO ORDERED.**

24 Dated: 6/6/2023

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26 HAYWOOD S. GILLIAM, JR.
27 United States District Judge
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